No. 982

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In the Supreme Court of the United States

OCTOBER TERM, 1966

COUNTY OF LOS ANGELES, PHILIP E. WATSON, COUNTY ASSESSOR, and HAROLD OSTLY, TAX COLLECTOR,

Petitioners,

vs.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Respondent.

Brief of Amicus Curiae State of California in Support of Petition for Writ of Certiorari

THOMAS C. LYNCH
Attorney General

JAMES E. SABINE
Assistant Attorney General

ERNEST P. GOODMAN
Assistant Attorney General

JOHN J. KLEE, JR.
Deputy Attorney General

6000 State Building
San Francisco, California 94102

Attorneys for Amicus Curiae State of California

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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The State of California hereby urges this Court to grant the Petition for Writ of Certiorari filed on behalf of the County of Los Angeles.

INTEREST OF AMICUS CURIAE

The State of California has filed this brief in support of petitioners for the reason that, if not corrected, the decision of the California District Court of Appeal could have significant effects on the revenues of this State and the political subdivisions thereof.

Though this decision involves a county *ad valorem* property tax, it might adversely affect the State of California's largest revenue source, it sales and use tax. The sales tax is a privilege tax of general application imposed on all retailers in the State of California, measured by the gross receipts from their sales of tangible personal property (California Revenue and Taxation Code, section 6051). The revenues produced by both state and local sales taxes could be seriously affected by the decision of the District Court of Appeal, which broadens the scope of the tax immunity granted by the Export Clause to an extent never before recognized by this or any other Court. In addition the *ad valorem* property tax revenues of the various political subdivisions of the State would suffer an unwarranted reduction.

ARGUMENT

The Decision of the California District Court of Appeal Is in Direct Conflict with Prior Decisions of This Court

The decision of the California District Court of Appeal is in direct conflict with the decision of this Court in *Empresa Siderurgica v. County of Merced,* 337 U.S. 154 (1948), which upheld an *ad valorem* property tax imposed by a county of this State in a situation similar to the present case.

The *Empresa* case involved a cement plant which had been sold to a foreign corporation for export to South America. By the tax lien date, the sale and shipment of the plant had progressed to the following point:

—an export license had been obtained

—a letter of credit in favor of the seller had been deposited here

—title and possession had passed to the purchaser

—a company, which was a common carrier, was employed to do the dismantling and packaging for shipment

—12% of the plant had actually been shipped
—10% had been dismantled and prepared for shipment
—34% had been dismantled but not prepared for shipment
—44% had not yet been dismantled

Under the same statutory authority involved in this litigation, the county levied an *ad valorem* property tax upon all the portions of the plant still in the county, i.e., on all but the 12% already shipped. This Court upheld the tax, holding that the property, *including the 10% that was packed and awaiting shipment,* had not yet begun the "process of exportation."

It is readily apparent that the property involved in the present litigation was not, on the tax lien date, nearly as close to entering the "export stream" as was the property involved in the *Empresa* case. For example, in *Empresa* title to the property had passed to the foreign purchaser and possession was taken for the purchaser, whereas, in the present case, the goods were still in the possession of the seller's agent. Neither title nor possession were to pass to the purchaser until the seller fulfilled his contractural obligation of delivering the goods to vessels designated by the purchaser. Thus we can conceive of no rationalization for holding that on the lien date the goods in this case were in the "export stream" whereas the property in the *Empresa* case was not.

The California District Court of Appeal did not discuss or attempt to distinguish the *Empresa* case. To the contrary, the California Court relied on the fact that the goods here involved were "not saleable" in this country. But "saleability" in this country is not, and should not be, the test used to determine when an item becomes an export.

The *Empresa* case itself discloses that the question of "saleability" is not relevant. Although not expressly stated in the opinion, it is evident that the various dismantled portions of the cement plant taxed in the *Empresa* case were not readily "saleable," especially since 12% of the plant was already out of the country.

Moreover, the "saleability" test would be completely unworkable. It would require, for instance, each county tax assessor to determine for each item of merchandise in his county whether the item is "saleable" in the domestic market. It is conceivable, then, that goods sitting in a seller's warehouse could be an export one year and not the next. This Court, in granting constitutional immunity only to those goods which have actually started the export process, has wisely avoided such irrational results. Furthermore, it is noteworthy that the California District Court of Appeal nowhere states what test is to be used to determine that an item is not "saleable" in this country. Must the assessor determine that there is no market whatsoever in this country for the product or is it enough to determine that the item could be sold more profitably abroad than domestically?

Because the decision of the California District Court of Appeal is so clearly contrary to the *Empresa* decision, we feel it would unduly lengthen this brief to discuss other decisions of this Court with which the California Court's decision is in conflict. Therefore, we simply cite, without discussion, the following decisions:

Coe v. Errol, 116 U.S. 517

Cornell v. Coyne, 192 U.S. 418

Diamond Match Co. v. Ontonagon, 188 U.S. 82

Joy Oil Co. v. State Tax Commission, 337 U.S. 286

CONCLUSION

Unless this Court intends to depart from its holding in *Empresa Siderurgica v. County of Merced, supra,* and the numerous other decisions with which it is in accord, the petition for certiorari in this case should be granted and the decision of the California District Court of Appeal reversed. In fact, the decision of the California District Court of Appeal is so clearly contrary to the *Empresa* decision that this case might properly be reversed, *per curiam,* without opinion.

Respectfully submitted,

THOMAS C. LYNCH
Attorney General

JAMES E. SABINE
Assistant Attorney General

ERNEST P. GOODMAN
Assistant Attorney General

JOHN J. KLEE, JR.
Deputy Attorney General

Attorneys for Amicus Curiae
State of California